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No.

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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

KERNS BAKERY, INC., - - - - - Petitioner,

VERSUS

KENTUCKY COMMISSION ON HUMAN

RIGHTS and

FRANK GOINS, - - - - - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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April 29, 1983

QUESTION PRESENTED

Must an employer place an employee, whose religious belief prohibits work on Sunday, on a four day work week, or require another employee with seniority to exchange positions with such employee in order to accommodate such employee's religious beliefs, as required by Title VII, 42 U.S.C. Section 2000e-2(a)(1), and Title VII, 42 U.S.C. Section 200e(J) (the Civil Rights Act of 1964).

TABLE OF CONTENTS

	PAGE
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Statement of the Case	2- 4
Reason for Granting the Writ—The Court of Appeals of Kentucky With the Approval of the Supreme Court of Kentucky Has Decided an Important Question of Federal Law in Conflict With a De- cision of This Court	4- 9
Conclusion	10
Proof of Service	11
Appendix	13-28
A. Judgment and Opinion of the Court of Appeals of Kentucky	13-19
B. Order of the Supreme Court of Kentucky Deny- ing Discretionary Review	20
C. Opinion and Judgment of the Laurel Circuit Court	21-28

TABLE OF AUTHORITIES

Cases:	PAGE
<i>Trans-World Airlines, Inc. v. Hardison</i> , 432 U. S. 63, 53 L. Ed. 2d 113, 97 S. Ct. 2264	5- 9
Statutes:	
KRS 344.040(1)	2
KRS 344.030(5)	2
Title VII, 42 U.S.C. Section 2000e-2(a)(1)	3, 6
Title VII, 42 U.S.C. Section 200e(J)	3, 6
Other:	
United States Constitution, First Amendment	2, 4
Kentucky Constitution, Section 5	4

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

No. _____

KERNS BAKERY, INC., - - - - - *Petitioner,*

v.

KENTUCKY COMMISSION ON HUMAN
RIGHTS and

FRANK GOINS, - - - - - - *Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY**

The Petitioner, Kerns Bakery, Inc., respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals of Kentucky decided October 8, 1982, and the final order of the Supreme Court of Kentucky denying discretionary review dated February 9, 1983.

OPINION BELOW

The judgment and opinion of the Court of Appeals of Kentucky is reported as *Kentucky Commission on Human Rights v. Kerns Bakery, Inc.*, Ky. App., 644 S. W.2d 350, and is reprinted in Appendix A, pp. 13-19.

The final order of the Supreme Court of Kentucky denying discretionary review is reprinted in Appendix B, p. 20.

JURISDICTION

The final order of the Supreme Court of Kentucky denying discretionary review was entered on February 9, 1983; this petition for a writ of certiorari was filed within 90 days of that date.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, First Amendment:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, * * * .”

STATEMENT OF THE CASE

The two statutes involved in this case are KRS 344.040(1) which provides:

“It is an unlawful practice for an employer (1) to fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, national origin, sex, or age between forty (40) and seventy (70)—”

and KRS 344.030(5) which provides:

“ ‘Religion’ means all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.”

In enacting the Kentucky Civil Rights Act (KRS Chapter 344), the legislature adopted the above-quoted statutes of the Federal Civil Rights Act of 1964.

The first quoted statute is practically identical to Title VII, 42 Section U.S.C. Section 2000e-2(a)(1), and the second to Title VII, 42 U.S.C. Section 200e(J).

The Petitioner is engaged in the manufacture of bakery products. In the baking industry it is a nationwide practice for the "off days" to be Tuesdays and Saturdays and the other five days, including Sundays, to be work days; the reason being to assure the consuming public of fresh products for the weekend and the beginning of the work week.

The Respondent, Frank Goins, was a production employee of the Petitioner. All production employees worked on Sundays. Goins united with a church (Free Pentecostal) that does not believe in working on Sunday.

After three Sunday absences Goins was terminated. Goins filed a complaint with the Kentucky Commission on Human Rights, an administrative tribunal, which conducted a hearing and found that the Petitioner had discriminated against Goins by not accommodating his religious beliefs under the statute quoted herein. It was further held that such accommodation could be accomplished without undue hardship on the conduct of the Petitioner's business. An award for reinstatement and back pay was entered against Respondent. Petitioner appealed the findings and award to the Laurel Circuit Court, which reversed the Commission on Human Rights upon the grounds that the statute

requiring the Petitioner to "accommodate" the religious views of the Respondent, Goins, was invalid because it conflicts with the establishment clause of the First Amendment to the Constitution of the United States and Section 5 of the Kentucky Constitution. (Appendix C, pp. 21-27) On appeal to the Court of Appeals of Kentucky the trial court was reversed. The Court of Appeals of Kentucky upheld the constitutionality of the accommodation requirement of the statute and further upheld the findings of the Commission on Human Rights that the Petitioner could have accommodated Respondent, Goins', religious beliefs by simply excusing him from Sunday work or by transferring him to another job. (Appendix A, pp. 13-19) The Supreme Court of Kentucky denied discretionary review, leaving intact the opinion of the Court of Appeals. (Appendix B, p. 20)

All Federal questions were timely and properly raised and presented from the trial level to the Supreme Court of Kentucky.

REASON FOR GRANTING THE WRIT

The Court of Appeals of Kentucky With the Approval of the Supreme Court of Kentucky Has Decided an Important Question of Federal Law in Conflict With a Decision of This Court.

At all stages in the proceedings below, the Petitioner contended that the "accommodation clause" of the Civil Rights Act was in conflict with the "establishment clause" of the First Amendment to the Constitution of the United States, and that it

would constitute an undue hardship on the conduct of the Petitioner's business to accommodate the religious beliefs of Respondent, Goins. The Commissioner on Human Rights and the Supreme Court held that it would not have created an undue hardship on the conduct of Petitioner's business to excuse Respondent, Goins, from Sunday work, thereby placing him on a four day week, or transferring him to a job that did not involve Sunday work. The evidence disclosed that there were only five jobs to which Goins could have been transferred. These five positions were outside the production department. One job was in the sanitation department. A lady employee has held this job for a number of years and the duties of this job consists of cleaning the offices. A temporary job was open in the maintenance department, and the other three jobs are in the bakery store where second day bread and "stale returns" are sold. These three employees are among the oldest employees on the seniority list in the Petitioner's organization.

In 1977 this Court decided *Trans-World Airlines, Inc. v. Hardison*, 432 U. S. 63, 53 L. Ed. 2d 113, 97 S. Ct. 2264. The issues in *Hardison, supra*, and the case at bar involve identical issues. The pertinent facts in *Hardison*, briefly stated, are:

Hardison, an employee of T.W.A., became a believer in the religion known as the Worldwide Church of God. One of the tenets of that religion is that one must observe the Sabbath by refraining from performing any work from sunset on Friday until sunset on Saturday. Efforts by the parties to resolve the conflict between

Hardison's work schedule and his observance of the Sabbath were unsuccessful and Hardison's employment was terminated for failure to work during the time he observed his Sabbath.

Hardison instituted an action in the United States District Court against T.W.A. and the Int. Assoc. of Machinists and Aerospace Workers (IAM), of which organization Hardison was a member, and which organization had a collective bargaining agreement. The action was brought pursuant to Section 703(a)(1) of the Civil Rights Act of 1964, Title VII, 42 U.S.C. Section 2000e-2(a)(1) and 42 Section 200e(J). The first section makes it an unlawful employment practice to discriminate against an employee or prospective employee on the basis of his or her religion. The second section requires an employer, short of "undue hardship", to make "reasonable accommodations" to the religious needs of its employees. The last section is commonly referred to as the "accommodation clause".

It was contended by T.W.A. that the "accommodation clause" violated the establishment clause of the First Amendment of the Constitution of the United States, and further contended that to accommodate Hardison's religious beliefs would place an undue hardship on the conduct of its business. The United States District Court did not pass on the constitutional issue presented, however, it did find that it would be an undue hardship on the conduct of T.W.A.'s business to accommodate Hardison's religious beliefs. On appeal to the United States Court of Appeals for the Eighth Circuit (527 F. 2d 33), the judgment of the United

States District Court was reversed, and the United States Court of Appeals for the Eighth Circuit held that Hardison's religious beliefs could have been accommodated without undue hardship on the conduct of T.W.A.'s business. The Court of Appeals suggested that the accommodation could be accomplished by placing Hardison on a four day work week or by transferring him to another job. This Court granted certiorari.

This Court reversed the United States Court of Appeals for the Eighth Circuit and held that it would constitute an undue hardship on the conduct of T.W.A.'s business to either place Hardison on a four day work week or to transfer him to another position. In writing for the majority, Mr. Justice White stated:

“The Court of Appeals also suggested that TWA could have permitted Hardison to work a four-day week if necessary in order to avoid working on his Sabbath. Recognizing that this might have left TWA short-handed on the one shift each week that Hardison did not work, the court still concluded that TWA would suffer no undue hardship if it were required to replace Hardison either with supervisory personnel or with qualified personnel from other departments. Alternatively, the Court of Appeals suggested that TWA could have replaced Hardison on his Saturday shift with other available employees through the payment of premium wages. Both of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages.

To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an

undue hardship. Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off the Court of Appeals would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.

As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."

Notwithstanding this Court's decision in *Hardison*, *supra*, which was cited in support of the Petitioner's position, the Respondent, Kentucky Commission on Human Rights, found that the Petitioner should have accommodated the Respondent, Goins', religious beliefs by placing him on a four day work week or by transferring him to another job. The trial court, the Court of Appeals of Kentucky and the Supreme Court of

Kentucky upheld the contention of the Respondent, Kentucky Commission on Human Rights.

The findings of the Respondent, Kentucky Commission on Human Rights, and the affirmance of those findings by the Court of Appeals and the Supreme Court of Kentucky, require the Petitioner to either place Goins on a four day work week or transfer him to another position contrary to this Court's ruling in *Hardison*.

If the decision of the Court of Appeals of Kentucky and the Supreme Court of Kentucky is allowed to stand, a precedent is established that will require the Petitioner and all other employers in Kentucky to discriminate against one employee in order to accommodate the religious beliefs of another employee, irrespective of whether such accommodation will place an undue hardship on the conduct of the employer's business.

If the Petitioner is required to place Goins on a four day work week, it will necessitate the hiring of another employee or leave the Petitioner shorthanded on Sundays, which, according to this Court's decision in *Hardison*, is more than a de minimis cost in order to give Goins Sundays off. If the Petitioner is required to transfer Goins to one of the remaining four positions that are open, it will require another employee to give up a job to an employee with less seniority and without regard to such employee's privileges.

CONCLUSION

The petition for a writ of certiorari should be granted.

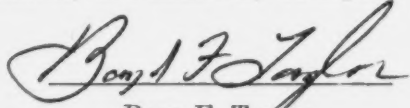
Respectfully submitted,

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April 29, 1983

PROOF OF SERVICE

I, Boyd F. Taylor, the counsel for the Petitioner, hereby certify that three (3) copies of the foregoing Petition for a Writ of Certiorari were mailed, first class postage prepaid, to Hon. Galen A. Martin and Hon. Thomas A. Ebendorf, Kentucky Commission on Human Rights, 701 West Muhammad Ali Boulevard, P. O. Box 60, Louisville, Kentucky 40201, Counsel for Respondents, this 29 day of April, 1983.

A handwritten signature in cursive script, reading "Boyd F. Taylor", written over a horizontal line.

BOYD F. TAYLOR

Attorney for Petitioner

OPINION RENDERED: OCTOBER 9, 1982; 10:00 A.M.
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 82-CA-724-MR

KENTUCKY COMMISSION ON HUMAN RIGHTS and
FRANK GOINS - - - - - *Appellants*

v.

KERNS BAKERY, INC. - - - - - *Appellee*

Appeal From Laurel Circuit Court
Hon. Robert H. Helton, Jr., Judge
No. 80-CI-481

REVERSING

BEFORE: HOWARD, McDONALD and REYNOLDS, JUDGES.

HOWARD, JUDGE. Kentucky Commission on Human Rights and Frank Goins appeal a judgment by the Laurel Circuit Court in which the court found the reasonable accommodations provision of K.R.S. 344.030(5) to be unconstitutional, therefore vacating an order of the Kentucky Commission on Human Rights and dismissing a complaint filed by Frank Goins against Kerns Bakery, Inc.

Appellant Frank Goins ("Goins") was employed by appellee Kerns Bakery, Inc. ("Kerns") as a roll oven operator in the production department. Kerns' production department worked five days a week, including Sundays, the "off-days" being Tuesdays and Saturdays. Goins worked on Sundays for two and one-half years.

In January, 1979, Goins began attending the East 80 Free Pentecostal Holiness Church and was later "saved,"

baptized and accepted into membership of the Church. One of the tenets of the Church is that Sunday is the Sabbath and its members are required to refrain from working on Sunday.

In May, 1979, Goins advised his supervisor of his religious belief against Sunday work and sought accommodation by way of a transfer to an available non-Sunday job or by being excused from Sunday work. Kerns made no effort to accommodate Goins and, when he failed to report to work for three Sundays, on May 28, 1979, he was fired.

Following his discharge, Goins filed a complaint with appellant, Kentucky Commission on Human Rights ("Commission"), alleging that Kerns had violated K.R.S. 344.040 by refusing to accommodate his religious belief and discharging him. On September 10, 1980, following a hearing, the Commission determined that Kerns had engaged in acts of religious discrimination in violation of K.R.S. 344.040. Specifically, the Commission found that Kerns had failed its statutorily required duty of making efforts to reasonably accommodate Goins' religious-based refusal to work on Sunday. The Commission also found that Kerns could have easily accommodated Goins without undue hardship to its business by either transferring him to an available non-Sunday job or simply excusing him from Sunday work.

Kerns, pursuant to K.R.S. 344.240, sought judicial review of the decision of the Commission, contending that: 1) the Commission's findings of fact were arbitrary and not supported by the evidence; 2) the Commission's order directing Kerns to pay back wages to Goins violated its right to trial by jury; and 3) K.R.S. 344.030(5) violated the "establishment clause" of the First Amendment to the Constitution of the United States and Section 5 of the Constitution of Kentucky.

On December 29, 1981, judgment was entered by the Laurel Circuit Court. The court found Kerns' first contention to be without merit since ". . . substantial evidence was presented . . . that Kerns could have accommodated Goins' religious belief and practice without undue hardship on the conduct of its business." The court also found Kerns' second contention to be without merit.

However, the court agreed with Kerns' third contention and concluded that "the reasonable accommodation provision of K.R.S. 344.030(5) violates the Establishment Clause of the First Amendment to the Constitution of the United States and Section 5 of the Constitution of Kentucky." The trial court then vacated and set aside the decision of the Commission and remanded the case to the Commission with directions to dismiss the complaint. This action by the trial court was clearly erroneous and we reverse its holding that K.R.S. 344.030(5) is unconstitutional.

Chapter 344 of the Kentucky Revised Statutes is the Kentucky Civil Rights Act. K.R.S. 344.030(5) is a definition section, known as the accommodation provision, which states:

(5) "Religion" means all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

This definition of "religion" must be read in conjunction with K.R.S. 344.040(1) which provides:

It is an unlawful practice for an employer:

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, con-

ditions or privileges of employment, because of such individual's race, color, religion, national origin, sex or age . . .

These pertinent sections of the Act are virtually identical to Title VII of the Federal Civil Rights Act of 1964, as amended in 1972, Sec. 701(j), Title VII, 42 U.S.C. Sec. 2000e. These sections clearly prohibit employers from discriminating against employees on the basis of religion, including discrimination against Sabbath observances by employees. The question then is, do the aforementioned provisions violate that part of the First Amendment to the Constitution of the United States which says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." and a similar provision found in Section 5 of the Kentucky Constitution?

The "reasonable accommodation" provision found in Title VII has been held to be constitutional in at least three federal circuit courts of appeal, including the Sixth Circuit. *Cummins v. Parker Seal Co.*, 516 F. 2d 544, 9 EPD 7772 (6th Cir. 1975), rev'd. on other grounds, 433 U. S. 2965 (1977). In *Cummins* the Court said that the accommodation provision promotes religious freedom, which benefits all people, and that the provision does not violate the Establishment Clause. The Court said, in part, "In our view, the primary effect of Regulation . . . is to inhibit discrimination, not to advance religion."

It is true, as appellee argues, that the courts of this country are divided on the issue of whether such accommodation provisions are constitutional. However, there is no question that the standard to be followed in deciding Establishment Clause cases has been set out by the Supreme Court in *Committee for Public Education v. Nyquist*, 413 U. S. 756 (1973).

Taken together, these decisions dictate that to pass muster under the Establishment Clause the law in question first must reflect a clearly secular legislative purpose, e.g., *Epperson v. Arkansas*, 393 U. S. 97, (1968); second, must have a primary effect that neither advances nor inhibits religion, e.g., *McGowan v. Maryland*, 366 U. S. 420 (1961); *School District of Abington Township v. Schempp*, 374 U. S. 203 (1963); and third, must avoid excessive government entanglement with religion, e.g., *Walz v. Tax Commissioner, supra*.

We agree with appellants that K.R.S. 344.040 meets these three tests and is therefore consistent with the Establishment Clause.

The secular purpose of this accommodation statute is to remove a barrier allowing discrimination in employment and to eliminate the situation where an employee is forced to abandon "one of the precepts of 'his' religion in order to accept work . . ." *Sherbert v. Verner*, 374 U. S. 398 (1963). By adopting this statute, the Legislature merely promotes equal employment opportunities for members of all religious faiths.

The accommodation provision also passes the second part of the test, in that it does not have a "primary effect" that advances or inhibits religion. As the Court said in *Nyquist, supra*, ". . . not every law that confers an 'indirect,' 'remote' or incidental benefit upon religious institutions is, for that reason alone, constitutionally invalid." The Legislature, by this provision, is in no way offering sponsorship, financial support or active involvement to any religious activity. As appellants contend, the primary effect of this accommodation accrues to individuals and not to any religious organization. Chief Justice Burger said in *Nyquist, supra*:

The answer, I believe, lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families.

The last part of the test for Establishment Clause cases is that the provision not involve an excessive entanglement of government in religion. The Legislature's interest here in religion is only for the purpose of outlawing religious discrimination in employment. This certainly cannot be interpreted as "excessive entanglement" in any sense of the words. The provision does not even attempt to absolutely mandate what an employer *must* do when faced with an employee seeking accommodation because of his religious beliefs. Instead, it provides that the employer should accommodate that employee *only if* he can "reasonably" do so "without undue hardship on the conduct of the employer's business." K.R.S. 344.030(5).

We find that the accommodation provision found in K.R.S. 344.030(5) is therefore constitutional. Since the record of the case indicates that Kerns could have made a reasonable effort to accommodate appellant Goins without undue hardship, the Commission was correct in ordering reinstatement of Goins.

The judgment of the Laurel Circuit Court is hereby reversed and the order of the Kentucky Commission on Human Rights is reinstated.

ALL CONCUR.

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SUPREME COURT OF KENTUCKY

**82-SC-870-D
(82-CA-724-MR)**

KERNS BAKERY, INC. - - - - - - *Movant*

v.

KENTUCKY COMMISSION ON HUMAN RIGHTS and
FRANK GOINS - - - - - - *Respondents*

*Laurel Circuit Court
No. 80-CI-481*

ORDER DENYING DISCRETIONARY REVIEW

The motion of Kerns Bakery, Inc., for a review of the decision of the Court of Appeals is denied.

ENTERED February 9, 1983.

(s) Robert F. Stephens
Chief Justice

COMMONWEALTH OF KENTUCKY
LAUREL CIRCUIT COURT

7TH JUDICIAL CIRCUIT
 FIRST DIVISION

Civil Action No. 80-CI-481

KERNS BAKERY, INC. - - - *Plaintiff-Petitioner*

v.

KENTUCKY COMMISSION ON HUMAN RIGHTS and
 FRANK GOINS - - - *Defendants-Respondents*

OPINION AND JUDGMENT

Kerns Bakery, Inc. (hereinafter Kerns) appeals from an Order of the Kentucky Commission on Human Rights (hereinafter Commission) which found that Kerns had engaged in an unlawful employment practice by discharging its former employee, Frank Goins, because of his religious beliefs and practices. The Commission ordered Kerns to cease and desist its unlawful practice and to reinstate Goins in his employment with various employee benefits, including back pay.

Kerns contends that (1) the Commission's findings of fact are arbitrary and not supported by the evidence, (2) the Commission's Order directing Kerns to pay back wages to Goins violates Section 7 of the Constitution of Kentucky guaranteeing the right to trial by jury, and (3) KRS 344.030(5) violates the "establishment clause" of the First Amendment to the Constitution of the United States and Section 5 of the Constitution of Kentucky.

The salient facts are summarized as follows: Kerns operates a wholesale commercial bakery in London, Kentucky. On July 16, 1976, Goins entered into the employ-

ment of Kerns and eventually became a roll oven operator in the production department. His supervisors agree Goins was a good worker. Working with Goins and his fellow employees in the production department were five "breakmen" and one "utilityman" who were employed for the purpose of "filling in" for absent employees and for temporarily taking over a particular job so that the regular worker on that job could take a fifteen-minute rest break twice each night. Because of the peculiar nature and requirements of the bakery business, the production department is in full operation on Sundays. The "off days" for production employees are Saturdays and Tuesdays because the production department does not operate on those days.

In January of 1979 Goins started attending worship services at The East 80 Free Pentecostal Holiness Church where as we later "saved", baptized and accepted into membership of the church. One of the tenets or doctrines of the church is that Sunday is the Sabbath and its members must refrain from servile labor on Sunday, Goins accepted that tenet and conscientiously believes in accordance with his faith that he should refrain from working on Sunday. In May of 1979 Goins advised supervisory personnel of Kerns of his religious belief against work on Sunday and inquired whether some arrangement might be made allowing him to be off work on Sundays. The requested arrangement or accommodation did not materialize. After Goins failed to report for work on three successive Sundays, he was discharged from his employment on May 28, 1979. Thereafter, Goins filed a complaint with the Commission.

Kerns' first contention is without merit. Substantial evidence was presented to the Commission that Kerns could have accommodated Goins' religious belief and practice without undue hardship on the conduct of its business.

With relatively minor inconvenience, one of the "break-men" could have been assigned to Goins' position on Sunday, or Goins could have been assigned a sanitation job which was available at the time, or he could have been transferred to a maintenance job, neither of which required work on Sunday. Suffice it to say that Kerns made little effort to accommodate Goins. The manager of Kerns was not even made aware of the problem before Goins was discharged and did not learn about the problem until Goins filed his complaint with the Commission.

Kerns' second contention that Section 7 of the Kentucky Constitution guaranteeing the right of trial by jury prohibited the Commission from awarding back wages to Goins is likewise without merit. *Stearns Coal and Lumber Co. v. Commonwealth*, 167 Ky. 51, 179 S. W. 1080; *NLRB v. Jones and Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893.

Kerns' third contention presents a far more serious and troublesome question. Can the Commonwealth of Kentucky compel a private employer to accommodate to the religious belief, observance and practice of his employee when the employer can do so without undue hardship on the conduct of its business? The State has attempted to do just that under the provisions of the Civil Rights Act of Kentucky, Chapter 344, Kentucky Revised Statutes. The pertinent sections of the Act are virtual reprints of Title VII of the Federal Civil Rights Act of 1964, as amended in 1972, Sec. 701(j), Title VII, 42 U.S.C. Sec. 2000e.

KRS 344.030(5) provides as follows:

"Religion" means all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

The language of Section 701(j) of Title VII is identical to the language of the Kentucky statute quoted above.

KRS 344.040(1) provides in part:

"It is an unlawful practice for an employer: (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, national origin, sex, or age between forty (40) and seventy (70);"

At this point it should be noted that although the constitutionality of a statute has been raised in this case, the Attorney General of the Commonwealth has not been given notice of such fact. Although none of the parties have raised the issue of lack of notice to the Attorney General, the Court has felt compelled to consider whether it has authority to determine the constitutional question presented. This Court concludes that it does have authority to consider and determine the question because an agency of the state is a party to this proceeding which renders CR 24.03 inapplicable, and since this is not a declaratory judgment action KRS 418.075 is inapplicable.

The First Amendment to the Constitution of the United States provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Section 5 of the Constitution of Kentucky contains a similar prohibition.

The constitutionality of the accommodation provision of Title VII has been under severe challenge and attack in several recent federal court cases. It appears that only the U. S. Sixth Circuit Court of Appeals, by a divided court, has found the provision to be constitutional. *Cummins v. Parker Seal Co.*, 516 F. 2d 544 (1975). The United States Supreme Court and the other U. S. Circuit Courts

that have had an opportunity to consider the issue have left the question open. The U. S. District Courts have split on the issue. Even the majority opinion in Cummins appears to have little, if any, validity with respect to the issue involved in this case. Although the Supreme Court initially affirmed Cummins, the affirmance resulted from an equally divided court, 429 U. S. 65, 97 S. Ct. 342, 50 L. Ed. 2d 223 (1976). Later, on petition for rehearing, the judgment of the Sixth Circuit was vacated, and the case was remanded for further consideration, 433 U. S. 903 (1977).

This Court concludes that the reasonable accommodation provision of KRS 344.030(5) violates the Establishment Clause of the First Amendment to the Constitution of the United States and Section 5 of the Constitution of Kentucky. This Court is led to that conclusion by the legislative history and exhaustive analysis of the issue in the well-reasoned opinion of Chief Judge Edward J. Schwartz of the United States District Court, Southern District of California, in the recent case of *Anderson v. General Dynamics Convair Aerospace Division, et al.*, 489 F. Supp. 782 (1980), and the vigorous dissenting opinion of Judge Celebrezze in *Cummins v. Parker Seal Co.*, *supra*.

As pointed out by Judge Schwartz in his comments regarding Title VII in *Anderson v. General Dynamics, supra*, the accommodation provision of KRS 344.030(5), contrary to its avowed purpose, actually mandates religious discrimination. The intent and effect of the definition of religion in Title VII and its Kentucky counterpart was to make it an unlawful employment practice for an employer not to make reasonable accommodations, short of undue hardship, for religious practices of his employees. No clearly secular legislative purpose is manifested in the Kentucky statute. Its real purpose is to aid religion and its practitioners. The Kentucky accommodation provision, as well as the Title VII provision, requires an overt prefer-

ence for the religious beliefs of certain employees and dictates that an employer must go out of his way to accommodate minority beliefs, even if such accommodation is detrimental or causes inconvenience or hardship to other employees. The provision discriminates between religion and nonreligion by favoring only those employees who hold religious beliefs. The accommodation requirement discriminates among religions by favoring only those beliefs which require modification of an employee's work rules and work schedules. And finally, the enforcement of KRS 344.030(5) through the mechanism of KRS 344.040 and 344.230 would excessively entangle the State of Kentucky with religion and undermine the constitutionally mandated neutrality of the State in its relations with religious believers and nonbelievers.

The Supreme Court of the United States has indicated in very positive language that governmental meddling and interference in religion will not be tolerated. In *Trans World Airlines, Inc. v. Hardison*, 432 U. S. 63 (1977), Mr. Justice White speaking for the seven-member majority said:

"As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."

The U. S. Supreme Court has very recently struck down state action in which the State of Kentucky attempted to interfere and become entangled with the religion of its youthful citizens. The Court declared unconstitutional KRS 158.178 which required the Superintendent of Public Instruction to post a copy of the Ten Commandments in

every public elementary and secondary classroom in Kentucky upon receipt of voluntary contributions made to the State Treasury for that purpose, *Stone v. Graham*, — U. S. —, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1981).

Earlier, in *Everson v. Board of Education*, 330 U. S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947) the Supreme Court wrote:

“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and state’.”

For the foregoing reasons, the aforementioned Order of the Kentucky Commission on Human Rights dated September 10, 1980, is vacated and set aside, and this case is remanded to the Commission with directions to dismiss the complaint filed by Frank Goins against Kerns Bakery, Inc. Further, the costs incurred in the Court are ADJUDGED against the defendant-respondent, Frank Goins.

Dated: December 29, 1981.

(s) Robert H. Helton, Jr.
Judge, First Division

Hon. Thomas A. Ebendorf
701 West Muhammad Ali Boulevard
P. O. Box 60
Louisville, Kentucky 40201

Hon. Boyd F. Taylor
129 East Fourth Street
London, Kentucky 40741

NOTICE OF ENTRY AND CERTIFICATE OF SERVICE

It is certified that the within Opinion and Judgment was entered in this Court and a true copy hereof mailed, postage prepaid, to counsel for the parties on this 29 day of December, 1981.

(s) Elden F. Keller, Clerk

By: Brenda Smith, D.C.

CERTIFICATION

I Elden Keller, Clerk of the Laurel Circuit Court, do hereby certify that the foregoing seven (7) pages hereto attached is a true and correct copy of the Opinion and Judgment as same appears of record in my office.

This 20th day of October, 1982.

(s) Elden Keller
Elden Keller, Clerk
Laurel Circuit Court

By: (s) June Woodyard, D.C.

FILED

MAY 31 1983

ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No. 82-1765

KERNS BAKERY, INC., - - - - **Petitioner,**

versus

**KENTUCKY COMMISSION ON HUMAN
RIGHTS and
FRANK GOINS,** - - -

Respondents

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY**

BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Table of Contents	i
Table of Authorities	ii
Opinion Below	2
Constitutional Provision and State Statute Involved	2
Counterstatement of the Case	2-3
Reasons for Denying the Writ	4-7
I. There is no Federal Statute nor Issue of Reasonable Accommodation Properly Before This Court	4-5
II. The Accommodation Provision of the Kentucky Civil Rights Act is Constitutional .	5-7
Conclusion	7
Proof of Service	8
Appendix	10-14
A. Findings of Fact, Conclusions of Law and Order of the Kentucky Commission on Human Rights	10-14

TABLE OF AUTHORITIES

	PAGE
Cases:	
<i>Epperson v. Arkansas</i> , 383 U.S. 97 (1968)	6
<i>Kentucky Commission on Human Rights v.</i> <i>Kerns Bakery, Inc.</i> , Ky. App., 644 S.W.2d 350 (1982)	6,7
<i>McGowan v. Maryland</i> , 366 U.S. 420, (1961) . . .	6
<i>Committee for Public Education v. Nyquist</i> , 413 U.S. 756 (1973)	5,6
<i>School District of Abington Township v.</i> <i>Schempp</i> , 374 U.S. 203 (1963)	6
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	6
<i>Walz v. Tax Commissioner</i> , 397 U.S. 664, 90 S. Ct. 1409, 25 L.Ed. 2d 697 (1970)	6
Statutes:	
Kentucky Civil Rights Act, Ky. Rev. Stat., § 344.040(1)	2
Kentucky Civil Rights Act, Ky. Rev. Stat., § 344.030(5)	2,7
Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et. seq.	4
Other:	
United States Constitution, First Amendment .	2,5

**IN THE
SUPREME COURT
OF THE UNITED STATES**

October Term 1982

No. 82-1765

KERNS BAKERY, INC., - - - - Petitioner,

versus

**KENTUCKY COMMISSION ON HUMAN
RIGHTS and
FRANK GOINS, - - - - Respondents.**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY**

The Respondents, Kentucky Commission on Human Rights (hereinafter referred to as "Commission") and Frank Goins (hereinafter referred to as "Goins"), oppose the Petition for a Writ of Certiorari to review the opinion and judgment of the Court of Appeals of Kentucky decided October 8, 1982, and the final order of the Supreme Court of Kentucky denying discretionary review of February 9, 1983.

OPINION BELOW

The judgment and opinion of the Court of Appeals of Kentucky is reported at Ky. App., 644 S.W.2d 350.

CONSTITUTIONAL PROVISION AND STATE STATUTE INVOLVED

United States Constitution, First Amendment:

"Congress shall make no law respecting, an establishment of religion or prohibiting the free exercise thereof,..."

The state statute involved is the Kentucky Civil Rights Act, Ky. Rev. Stat. 344, and more specifically two sections, Ky.

Rev. Stat. § 344.040(1) which provides:

"It is an unlawful practice for an employer to fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, national origin, sex or age between forty (40) and seventy (70)..."

and Ky. Rev. Stat. § 344.030(5) which provides:

"'Religion' means all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case, while succinct, does omit a few relevant facts. Goins had, prior to his discharge for

missing scheduled Sunday work, been considered a good worker. Goins' only reason for failing to work on Sunday was because his sincerely held religious belief prohibited him from working on his Sabbath.

Prior to missing this Sunday scheduled work, Goins had advised his supervisors of the religious-based conflict, sought accommodation, and made efforts to achieve an accommodation. Petitioner, Kerns Bakery, Inc., made no efforts to accommodate Goins, insisted that he work on his Sabbath, and discharged him when he refused.

Following his discharge, Goins filed a complaint with the Commission alleging that his rights under state law (Kentucky Civil Rights Act) had been violated by Petitioner. An administrative hearing was held and a Finding of Facts, Conclusions of Law and Order was entered. This document is reprinted in Appendix A, pp. 10-14. Petitioner appealed this decision to Laurel Circuit Court. This state circuit court upheld the Commission's findings that Petitioner could have accommodated Goins without undue hardship to the conduct of its business, but reversed on the sole grounds that the accommodation requirement was invalid because it conflicted with the Establishment Clause of the First Amendment to the Constitution of the United States and Section 5 of the Kentucky Constitution.

Respondents appealed this ruling of unconstitutionality. Petitioner did not cross-appeal the ruling that Goins could have been accommodated without undue hardship. The single issue before the Kentucky Court of Appeals, then, was the issue of constitutionality. That Court reversed the appellate decision of the Laurel Circuit Court and reinstated the Commission's Order.

REASONS FOR DENYING THE WRIT

I.

There Is No Federal Statute Nor Issue Of Reasonable Accommodation Before This Court.

Although Petitioner carefully constructs its "Question Presented" to invoke consideration by this Court of the factual issue of reasonable accommodation under the pertinent provisions of Title VII, 42 U.S.C. § 2000e, et. seq., (the federal Civil Rights Act of 1964) this is not an appeal of a decision that a federal statute has been violated. The complaint was brought under state statute, the Kentucky Civil Rights Act (Ky. Rev. Stat. 344) and Petitioner was found to have violated state, not federal, law. For this Court to review the question presented by Petitioner it would have been necessary for Goins to have filed a charge with the U.S. Equal Employment Opportunity Commission, submitted to an investigation by the U.S. Equal Employment Opportunity Commission, filed a law suit against Petitioner in federal district court, won a favorable decision, and survived an appeal in the U.S. Court of Appeals for the Sixth Circuit. None of this was done.

Petitioner is attempting, with this Petition, to by-pass these necessary prerequisites to review and bootstrap itself into a review of the accommodation issue by an artful, albeit inaccurate, statement of the "Question Presented."

Assuming for the sake of argument that Petitioner is entitled to a review by this Court, it cannot possibly be on the issue of accommodation, because Petitioner never appealed the adverse ruling of the Laurel Circuit Court. That court held that Petitioner's challenge was "without merit." (Petitioner's Appendix p. 22). In explaining, the court said:

"Substantial evidence was presented to the Commission that Kerns could have accommodated Goins' religious

belief and practice without undue hardship on the conduct of its business. With relatively minor inconvenience, one of the 'breakmen' could have been assigned to Goins' position on Sunday, or Goins could have been assigned a sanitation job which was available at the time, or he could have been transferred to a maintenance job, neither of which required work on Sunday. Suffice it to say that Kerns made little effort to accommodate Goins. The manager of Kerns was not even made aware of the problem before Goins was discharged and did not learn about the problem until Goins filed his complaint with the Commission." (Petitioner's Appendix pp. 22-23).

When Respondents appealed the opinion of the Laurel Circuit Court that the state law was unconstitutional, Petitioner could have cross-appealed the Laurel Circuit Court's opinion that Kerns could have accommodated Goins. However, Petitioner stood silent, and should not now be allowed to retrieve and revive its previously discarded argument.

II.

The Accommodation Provision Of The Kentucky Civil Rights Act Is Constitutional.

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This Court has frequently grappled with the tensions existing between the Free Exercise Clause and the Establishment Clause. The effort of the Court has been to find a neutral course between the two clauses, "both of which are cast in absolute terms, and either of which, if expanded to a logical extreme would tend to clash with the other." *Walz v. Tax Commissioner*, 397 U.S. 664, 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).

In *Committee for Public Education v. Nyquist*, 413 U.S.

756, 772 (1973) this Court in reviewing its previous decisions outlined its standards:

"Taken together, these decisions dictate that to pass muster under the Establishment Clause the law in question, first must reflect a clearly secular legislative purpose, e.g., *Epperson v. Arkansas*, 393 U.S. 97, (1968); second, must have a primary effect that neither advances nor inhibits religion, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); and, third, must avoid excessive government entanglement with religion, e.g., *Walz v. Tax Commissioner*, *supra*.

The pertinent sections of the Kentucky Civil Rights Act, Ky. Rev. Stat. § 344.040 and § 030(5) meet these tests and are fully consistent with the First Amendment. As stated by the Kentucky Court of Appeals:

"The secular purpose of the accommodation statute is to remove a barrier allowing discrimination in employment and to eliminate the situation where an employee is forced to abandon 'one of the precepts of his religion in order to accept work...' *Sherbert v. Verner*, 374 U.S. 398 (1963). By adopting this statute, the Legislature merely promotes equal employment opportunities for members of all religious faiths." *Kentucky Commission on Human Rights v. Kerns Bakery, Inc.*, 644 S.W.2d 350, 353 (1982).

The primary effect of this provision neither advances nor inhibits religion. This provision does not promote, sponsor, support, or involve the state in a religious activity. Its primary effect accrues to individuals and not to any religious organization. Any benefit which a particular religious organization might derive from this provision is so remote as to be inconsequential.

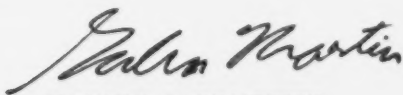
This provision does not involve the state in an excessive entanglement in religion. "The Legislature's interest here in

religion is only for the purpose of outlawing religious discrimination in employment." *Kerns, Id.*, at 353. Further, the provision does not fabricate a remedy for every possible religious conflict, nor does it require that all such possible conflicts be accommodated. Rather, it directs the employer to treat each situation individually and accommodate the employee "only if he can 'reasonably' do so 'without undue hardship on the conduct of the employer's business.' K.R.S. 344.030(5)." *Kerns, supra.*, 353. (emphasis in original).

CONCLUSION

For the foregoing reasons, Respondents, Kentucky Commission on Human Rights and Frank Goins submit that the Petition for a Writ of Certorari should be denied.

Respectfully submitted,



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May 27, 1983

PROOF OF SERVICE

I, Galen A. Martin, the counsel for the Respondents, hereby certify that three (3) copies of the foregoing Brief For Respondents In Opposition were mailed, via First Class Mail, postage prepaid, to Honorable Boyd F. Taylor, TAYLOR & JENSEN, P.O. Box 905, London, Kentucky 40741, Counsel for Petitioner, this 27 day of May, 1983.



GALEN A. MARTIN

Counsel for Respondents

COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY COMMISSION ON HUMAN RIGHTS
Complaint No. 1365-E

IN THE MATTER OF)
KERN'S BAKERY) **FINDINGS OF FACT**
) **CONCLUSIONS OF LAW**
) **ORDER**

The Kentucky Commission on Human Rights, having held a one-day public hearing in the above-captioned matter on May 19, 1980, in London, Laurel County, Kentucky, and having reviewed the transcript of the hearing and all exhibits filed herein, and having considered the briefs filed by counsel, and having carefully weighed the arguments of all parties, makes and adopts the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Kern's Bakery (hereinafter referred to as Respondent) operates a commercial wholesale bakery in London, Kentucky. Its operation is divided into several departments and includes a department known as the production and sanitation department. There are approximately 100 persons employed in this one department.

2. Frank Goins (hereinafter referred to as Complainant) was employed by the Respondent in the production and sanitation department from July 16, 1976 until May 28, 1979. At all relevant times herein, Complainant held the position of roll oven operator on the second shift.

3. In January 1979, the Complainant began attending religious services at the East 80 Free Pentecostal Holiness Church. He was "saved" on March 17, 1979 and was baptized on April 14, 1979.

4. It is the sincere religious belief of the membership and minister of East 80 Free Pentecostal Holiness Church that Sunday is the Sabbath and that on the Sabbath no person should engage in ordinary work for pay. Complainant has since his baptismal held the same sincere religious belief that he should refrain from work on Sunday.

5. Almost all of the employees of Respondent's production and sanitation department are regularly scheduled to work on Sundays as a part of the five-day work week. The department does not normally work on Tuesdays and Saturdays. This work week is common in the commercial wholesale bakery industry.

6. In May 1979, Complainant advised of Respondent's supervisory personnel of his religious belief against Sunday work.

7. Respondent made no efforts to accommodate the Complainant's religious-based need to be absent from work on Sundays.

8. Complainant was discharged from his employment on May 28, 1979, because he refused to work on Sunday, and because for religious purposes and belief he failed to report for work on the following Sundays: May 6, 1979, May 20, 1979 and May 27, 1979.

9. Complainant filed a written sworn complaint with the Commission on November 9, 1979, claiming that he was aggrieved by an unlawful practice with regard to his discharge by Respondent.

10. Respondent employees at its London, Kentucky, facility are not unionized and are not subject to nor derive any rights from the terms of any collective bargaining agreement.

11. Respondent failed or refused to exercise the available option of offering Complainant to the temporary painter's helper job which was vacant and did not require Sunday work.

The temporary painter's helper job was filled on May 23, 1979, and ended on December 14, 1979.

12. As a result of Respondent's failure to accommodate the Complainant, the Complainant was discharged from his employment as a roll oven operator. Complainant suffered damages in the form of lost wages and lost benefits accruing from the date of Complainant's discharge.

13. Following his discharge Complainant made numerous and repeated efforts to obtain other employment.

CONCLUSIONS OF LAW

1. The Kern's Bakery is an "employer" as defined KRS 344.030 (1).

2. Frank Goins is an "individual claiming to be aggrieved by an unlawful practice" under KRS 344.200 (1).

3. Frank Goins was discharged from his employment with Kern's Bakery because he refused, as a matter of religious observance, practice, and belief, to work on Sundays.

4. The Kern's Bakery could have reasonably accommodated Mr. Goins' religious practice prohibiting Sunday work without undue hardship on the conduct of the company's business by reassigning him or excusing him and assigning substitutes to work in his place. This accommodation was required according to the standards imposed under the case of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979); and *Kentucky Commission on Human Rights v. Commonwealth of Kentucky, Department for Human Resources, Hazelwood Hospital*, Ky. App., 564 S.W. 2d 38 (1978). This accommodation would not have violated a union contract or seniority agreement, and would not have imposed any cost above *de minimus*.

5. It was the duty of Kern's Bakery to make reasonable effort to accommodate Complainant's religious practices and they made no such effort and the failure to make such effort is a violation of KRS 344.040 and KRS 344.030(5).

6. As a direct and proximate result of Respondent's failure to accommodate Frank Goins, he suffered damages in the following extent and manner, to-wit:

A. Mr. Goins was discharged from his employment as a roll oven operator.

B. Mr. Goins suffered a loss of seniority and other employee benefits.

C. Mr. Goins suffered monetary damages in the form of lost wages.

ORDER

IT IS THEREFORE ORDERED that Respondent:

1. Immediately cease and desist its unlawful practice of religious discrimination.

2. Immediately reinstate Complainant, Frank Goins, to a position at Kern's Bakery, and restore Complainant's seniority and employee benefits.

3. Pay to Complainant, Frank Goins, an amount equal to all gross wages Complainant would have earned from May 28, 1979, to his date of reinstatement. This amount shall be diminished by appropriate state and federal taxes and by all interim earnings. The parties shall submit to the Commission within thirty (30) days a proposed supplementary order setting forth the amount of wages to be paid Complainant which shall reflect the manner of calculation and all proposed deductions.

4. Respondent shall henceforth accommodate the Complainant's desire for religious reasons, to be excused from Sunday work. This provision shall remain in effect for so long as the Complainant remains employed at Kern's Bakery or un-

til the Respondent demonstrates to the Commission, upon appropriate motion, that due to changed circumstances, said accommodation imposes an undue hardship on the conduct of Respondent's business.

5. Report the manner of compliance within thirty (30) days of this Order.

THIS THE 10 DAY OF SEPT., 1980.

(s) _____
Edmund P. Karem
Chairperson
Kentucky Commission on Human Rights